FILED
SEP 18 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 360

THOMAS FONTANA,

Petitioner,

—v.—

HURON STEVEDORING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

NATHAN BAKER
Proctor for Petitioner
401 Broadway
New York City, New York

BERNARD CHAZEN
On the Brief

INDEX

PAGE

Petition for Writ of Certiorari 1

Summary Statement of the Matter Involved 1

Jurisdictional Statement 3

Questions Presented 4

Reasons Relied on for Allowance of the Writ 4

Prayer for Writ 6

Brief in Support of Petition for Writ of Certiorari 7

Opinions of the Courts Below 7

Jurisdiction 7

Statement of Case 7

Statutes and Rules Involved 8

Assignment of Errors 10

Argument 11

Point I:

An employer may not obtain from a third-party recovery which was secured by the efforts of the injured employee the amount of his expenditures under the LHWCA 11

PAGE

(a) The provisions of the LHWCA do not give an employer any right to recover from a third-party recovery payments made pursuant to the requirements of the LHWCA but not under an award 11

(b) Only the legislature has the power to add substantial new provisions to the LHWCA 16

(c) There is no principle of common law which would entitle the employer to be reimbursed for payments made pursuant to the LHWCA without an award 18

POINT II:

Where a third person claims part of a fund wholly procured by the efforts of another the part of the fund so claimed is subject to the reasonable expenses incurred in procuring this fund 23

(a) Admiralty courts apply the principles of equitable jurisprudence 23

(b) Equitable principles provide for a reasonable attorney's fee out of a fund in court which is created or protected by the efforts of one party to the benefit of others 25

CONCLUSION 30

CASES CITED

American Foreign Steamship Corp. v. 9000 Tons Ore, 1952 A.M.C. 1818 (1952) 24

American Stevedores v. Porello, 330 U.S. 446; 67 S. Ct. 847 (1947) 12

PAGE

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 52 S. Ct. 187 (1932) 21
Brusich v. Grace Line, 56 F. Supp. 48 (S.D., N.Y., 1944) 12

Conrad v. Aero-Mayflower, 152 Pa. Super. 477, 33 A 2d 91 (Super. Ct. 1943) 15
Crab Orchard Imp. Co. v. Chesapeake & Ohio Ry. Co., 115 F 2d 277 (4th Cir., 1940) cert. den. 312 U.S. 702, 615 S. Ct. 807 (1941) 18
Cupo v. Isthmian S. S. Co., 56 F. Supp. 45 (S.D., N.Y., 1941) 12

Dugan Bros. v. Robinson, 139 N.J. Eq. 318; 51 A 2d 218 (Chanc. 1947) 17

Grasso v. Lorentzen, 56 F. Supp. 51 (S.D., N.Y., 1944) aff'd 149 F 2nd 127 (2 Cir. 1945) cert. denied 326 U.S. 743, 66 S. Ct. 57, 90 L. Ed. 444 (1946) 12

Harrison v. Perea, 168 U.S. 311, 18 S. Ct. 129, 42 L. Ed. 478 (1897) 25

Iaria v. Silver Line, 56 F. Supp. 42 (S.D., N.Y., 1943).. 12

Klotz v. Pfister & Vogel Leather Co., 220 Wisc. 57, 264 N.W. 495 (1936) 15

Marlin v. Cardillo, 95 F2d 112 (CA, DC, 1938) 17
Maryland Casualty Co. v. Stephens, 76 Ga. App. 733, 47 S.E. 2nd 108 (1948) 16
Moran Transportation Corp. v. Mellina, 185 F 2d 386 (2 Cir., 1950) 23

Newark Paving Co. v. Klotz, 85 N.J.L. 432, 91 A 91 (Sup. Ct. 1914) 22

PAGE

New York S & W R. Co. v. Huebschmann, 111 N.J. Eq. 547, 162 A 767 (1932) 17

Ocean SS Co. v. Lumbermens Mut. Cas. Co., 125 F2d 925 (2 Cir., 1942) 29

O'Hara v. Oakland County, 136 F 2nd 152 (6 Cir., 1943) 26

Pillsbury v. United Engineering Co., 342 U.S. 197, 72 S. Ct. 223 (1952) 6, 16

Romano v. United States, 90 F. Supp. 15 (S.D., N.Y. 1950) 12

Sessa v. Weeks Stevedoring, 56 F. Supp. 51 (S.D., N.Y. 1943) 12

Sprague v. Ticonic National Bank, 307 U.S., 161, 59 S. Ct. 777 (1939) 6, 28

The Etna 138 F 2d 37 (3 Cir. 1943) 5, 13, 18 21, 24

Travelers Ins. Co. v. Lumber Mutual Ins. Co. 20 N.J. Super. 265, 89 A 2nd 717 (Chanc. Div. 1952) 15

Trumbull Cliffs Furnace Co. v. Schachovsky, 111 Ohio 791, 146 N.E. 306 (1924) 22

Truscon Steel Co. v. Trumbull Cliffs Furnace Co. 120 Ohio St. 394, 166 N.E. 368 (1929) 23

United Fruit Co. v. United States 186 F 2nd 890 (1 Cir. 1951) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

THOMAS FONTANA,

Petitioner,

—v.—

HURON STEVEDORING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

The libellant, who is the petitioner in this court, Thomas Fontana, had been injured on board a lighter at Pier 57, North River, New York, on August 31, 1945.

Libellant's employer, Huron Stevedoring Corporation, had paid a total of $1,732.54 for disability and medical payments pursuant to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as

the LHWCA) (pages 12, 13). However, these payments were not made pursuant to an award by a Deputy Commissioner (page 12). On June 8, 1948, the libellant served a notice of election to sue with the Deputy Commissioner (page 12). On August 25, 1948 he filed a libel and started the present action (page 1). Grace Line Inc. and States Marine Corporation were respondents. The Huron Stevedoring Corporation, The Pennsylvania Railroad, and others were subsequently impleaded (page 10).

Prior to the commencement of the trial before Judge Ryan, the libellant settled his case with the Pennsylvania Railroad Company for $4000.00. The case was dismissed as to the Huron Stevedoring Corporation and was discontinued as to all the other respondents (page 4). Huron Stevedoring Corporation did not participate in the agreement to compromise the claim, and did not procure, consent to, or approve the settlement with the Pennsylvania Railroad Company (page 11).

Because the Huron Stevedoring Corporation claimed it had a lien, libellant and the Pennsylvania Railroad Company stipulated that the settlement funds be deposited with the Clerk of the District Court (pages 4 and 5). This was approved and permitted by the court (page 6). Then Huron Stevedoring Corporation was permitted to intervene, the libellant being permitted to withdraw $2,267.46, the excess above Huron's alleged lien (pages 7 and 8).

Huron Stevedoring Corporation then filed its petition asking that it be awarded the full amount of $1732.54 (pages 9-13). Libellant answered, admitted all the factual allegations, but denied the alleged claim on the ground that the LHWCA did not give to the intervenor the right to any lien, and that whatever payments were made by the intervenor were made pursuant to its statutory duty, that libellant was entitled to the entire settlement amount because

it was procured solely at his own effort, risk and expense, that libellant had elected to pursue a third-party for his remedy and that under the terms of the LHWCA he waived all right to further recourse against his employer, the intervenor, by so doing because his employer refused to approve the settlement, and that, if the alleged lien was allowed, reasonable proctor's fees, and the expenses of investigation, suit, and preparation for trial be deducted (pages 14, 15).

After argument, the court below rendered its opinion (pages 17, 18, 19, 20, 21, 22) and the court ordered that the full amount of $1732.54 be paid to the intervenor. It is from this order that libellant appeals (page 25). On appeal to the United States Court of Appeals for the Second Circuit, the decree of the court below was affirmed.

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the decree here in question because a decree of the United States Court of Appeals, Second Circuit dated June 22, 1953 is involved, and this decree interprets of an important statute, the Longshoremen's and Harbor Workers' Compensation Act, in the absence of language in the statute to such effect, to deny the right of longshoremen, who are regarded in law as seamen, and who are entitled to the protection of the courts of admiralty, and the liberal interpretation of the said statute to retain the full amount of money recovered by the sole efforts of the longshoreman from one not an employer, or, in the alternative, to permit such longshoremen, under the equitable principles applied in admiralty to keep a share of the funds recovered which they are not permitted to retain under the decisions below, for the attorney's fees and other expenses involved in obtaining the recovery. The statutes involved are 33

U.S.C.A. 907 and 933; the rule involved is Rule 42 of the United States Supreme Court Admiralty Rules.

The jurisdiction of this court is found in 28 U.S.C.A. 1254(1) and 28 U.S.C.A. 2101(c).

Questions Presented

1. Whether or not an employer may obtain the full amount of expenditures made by him as a result of the terms of the LHWCA from a recovery from a third-party based on negligence or unseaworthiness where the recovery was procured solely at the expense of and as a result of the efforts of the employee, and his attorney, in the absence of any provision of the LHWCA allowing such payment to the employer?

2. Whether or not, if the answer to the prior question is affirmative, the money which is given to the employer is subject to a reasonable charge for the attorney's fees and expenses involved in procuring the fund from which the employer benefits?

Reasons Relied on for Allowance of the Writ

1. The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court. There is hardly a case based on injuries to longshoremen which does not involve the questions presented in this case. Where compromises and adjustments must be made in third-party suits they become difficult if not impossible because the employer or his insurance carrier alleges and claims a full lien. The problem constantly plagues judges who try to encourage settlements in these cases. The courts below have, by judicial decision in effect amended the LHWCA to provide for payment to

the employer or his insurance carrier of money out of the third-party recovery obtained by the employee without giving consideration to the equitable claims for fees of those who procured the fund from which the employer or his carrier claim their benefits. The issues are clear and simple, but the resolution of these issues is very important in literally hundreds of cases each and every year. These issues not only must be resolved, but they must be resolved fairly and equitably, and in accordance with accepted principles of statutory construction.

2. There is a conflict among the circuit courts on one of the fundamental issues before this court, *i.e.*, whether an employer is entitled to payment to the extent of compensation expenditures in the absence of specific statutory provision therefor. Judge Weinfeld followed *The Etna* 138 F2d 37 (3 Cir., 1943) in deciding this case. He recognized a conflict between that case and another, at least so far as the reasoning of the court was involved. He stated (pp. 20-21):

> "Libelant has adduced no authority hostile to The Etna holding. Crab Orchard Imp. Co. v. Chesapeake and Ohio Ry. Co., 115 F. 2d 277, cert. den. 312 U.S. 702, on which libelant leans heavily, involved the W. Va. Workmen's Compensation Act, not the Longshoremen's and Harbor Workers' Compensation Act. Insofar as the reasoning of the Crab Orchard case may conflict with that of The Etna, the court regards the ruling in The Etna, which deals with the Act with which we are here concerned, as the more persuasive."

The conflict between the Third Circuit and the Fourth Circuit, which is discussed at length under Point I(c) of the brief, while involving different statutes, is fundamental

so far as the difference in reasoning is concerned. The issue should be resolved by this court to guide courts on similar issues of construction which will arise in the future.

3. The courts below have decided the issues probably in conflict with the applicable decisions of this court because:

(a) The construction of the courts below does not liberally construe the LHWCA for the benefit of the injured longshoremen, and further the courts have usurped a legislative function in that they have in effect amended the LHWCA by judicial construction. See *Pillsbury* v. *United Engineering Co.* 342 U.S. 197, 72 S.Ct. 223 (1952).

(b) The courts failed to allow reasonable attorney's fees and reimbursement for expenses to the one who produced a fund from which others benefit. See *Sprague* v. *Ticonic National Bank* 307 U.S. 161, 59 S.Ct. 777 (1939).

Prayer for Writ

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

NATHAN BAKER
Proctor for Petitioner
401 Broadway
New York City

BERNARD CHAZEN, Esq.
On the Brief

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

THOMAS FONTANA,

Petitioner,

—v.—

HURON STEVEDORING CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of Judge Weinfeld appears in 106 F. Supp. 461, and at page 17 of the record. The United States Court of Appeals affirmed on the opinion below.

Jurisdiction

The basis for the jurisdiction of this court is set forth under the "jurisdictional statement" in the petition herein (p. 3).

Statement of Case

This has already been stated in the preceding petition under the "Summary Statement of the Matter Involved" which is adopted and made a part hereof (p. 1).

Statutes and Rules Involved

Title 33 U.S.C.A., section 907:

"Medical services and supplies. • • •

(d) The liability of an employer for medical treatment as provided in this section shall not be affected by the fact that his employee was injured through the fault or negligence of a third party, not in the same employ, unless and until notice of election to sue has been given as required by section 933 (a) or suit has been brought against such third party without the giving of such notice. The employer shall, however, have a cause of action against such third party to recover any amounts paid by him for such medical treatment in like manner as provided in section 933 (b) of this chapter."

Title 33 U.S.C.A., section 933:

"Compensation for injuries where third persons are liable. • • •

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

• • • • •

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable

attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this Chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to

which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) of this section only if such compromise is made with his written approval.

RULE 42, Supreme Court Admiralty Rules:

"CLAIMS AGAINST PROCEEDS IN REGISTRY.

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene pro interesse suo for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party."

Assignment of Errors

The United States Court of Appeals, Second Circuit, erred in holding that:

1. The respondent-employer was entitled to payment out of the funds recovered by petitioner in a third-party action by virtue of the LHWCA;

2. The respondent-employer was entitled to payment out of the funds recovered by the petitioner in a third-party action by virtue of common-law or equitable principles;

3. The LHWCA prevented the court from allowing a reasonable amount for attorney's fees and expenses

involved in recovering the fund procured by petitioner, from which the respondent-employer seeks to benefit;

4. The petitioner under equitable principles and the rules of this court in admiralty is not entitled to an allowance of a reasonable amount for the attorney's fees and expenses involved in recovering the fund from which the respondent-employer seeks to benefit.

POINT I

An employer may not obtain from a third-party recovery which was secured by the efforts of the injured employee the amount of his expenditures under the LHWCA.

(a) ***The provisions of the LHWCA do not give an employer any right to recover from a third-party recovery payments made pursuant to the requirements of the LHWCA but not under an award.***

The respondent, who was the intervenor in the court below, claims that it has a lien against a third party recovery payments made by it under Section 33 (b) of the LHWCA. 33 USCA 933 (b). This section provides:

> "Acceptance of such compensation *under an award in a compensation order* filed by the deputy commissioner *shall operate as an assignment to the employer* of all right of the person entitled to compensation to recover damages against such third person." [Italics ours]

The compensation which the intervenor paid was not paid "under an award." This section had been expressly limited to compensation "under an award" by an amendment in 1938. Prior to that any compensation, whether

"under an award" or not operated as an assignment. See *Grasso* v. *Lorentzen* 56 F. Supp. 51 (S.D., N.Y. 1944) aff'd 149 F2nd 127 (2 Cir. 1945) cert. denied 326 U.S. 743, 66 S.Ct. 57, 90 L. Ed. 444 (1946); *Romano* v. *United States* 90 F. Supp. 15 (S.D., N.Y., 1950); *Iaria* v. *Silver Line* 56 F. Supp. 42 (S.D., N.Y., 1943); *Cupo* v. *Isthmian* 56 F. Supp. 45 (S.D., N.Y. 1941); *Brusich* v. *Grace Line* 56 F. Supp. 48 (S.D., N.Y., 1944); *Sessa* v. *Weeks Stevedoring* 56 F. Supp. 51 (S.D., N.Y. 1943).

There is nothing express or implied in the language of 33 USCA 933 (b), quoted *supra* which gives the employer rights of any kind with reference to a lien against proceeds or anything else involving a third-party claim, where no compensation "under an award" is involved. The language of this section is clear and unambiguous. There is no question of any interpretation of any words. Had Congress intended to give a lien it could have said so without any difficulty.

In *American Stevedores* v. *Porello* 330 U.S. 446, 67 S.Ct. 847, (1947) the defense was raised whether the acceptance of compensation, even if without an award, constituted an election to sue, barring an action by the employee against the third party. In holding that it did not Mr. Justice Reed stated for the court at page 455:

> "Congress has provided that unless an employer controverts the right of the employee to receive compensation, he must begin payments within two weeks of the injury. The employee thus receives compensation payments quite soon after his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue, save the general limitation of one year upon the time to make a claim for

compensation. The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor."

The court below relied heavily on *The Etna* 138 F2nd 37 (3 Cir. 1943), and quoted from it in support of the construction it gives to Section 33 (b) *supra*, (Folio 56). The court below quoted the following from the opinion in *The Etna* (Folio 56).

"• • • We find no intent indicated by the Act to take away from the employer who pays compensation without an award his right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized wholly apart from and without regard for the assignment provided for in Sec. 33 (b) of the Act. It is only the right of control of the employee's right of action against third persons which an employer foregoes by paying compensation without an award. His right to reimbursement out of the recovery for the employee's injury remains unaffected."

It is to be noted that this quotation involves an untenable assumption. The court apparently assumes that the employer prior to the 1938 amendment had a right to reim-

bursement distinct from his right to control the employee's cause of action. This is not true. The act makes the right to control the employee's cause of action and assume the effort, expense, and risk of third-party litigation an integral part of the employer's right to recover anything. In the very same section under another subheading, the question of reimbursement is discussed. 33 USCA 933 (e) provides:

> "Any amount *recovered by such employer on account of such assignment,* whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) *the employer shall retain* an amount equal to—
>
> (A) *the expenses incurred by him* in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);
>
> (B) the cost of all benefits actually furnished by him to the employee under section 907;
>
> (C) all amounts paid as compensation;
>
> (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, *and the amounts so computed and estimated to be retained by the employer as a trust fund* to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) *the employer shall pay* any excess to the person entitled to compensation or to the representative." [Italics ours]

The provision dealing with medical services and supplies in 33 USCA 907 (d) operates in the same way as Section 33 (b) *supra.* The LHWCA provides that the employer gets reimbursement when he *assumes the risk and expense* of third-party litigation. There was and is nothing in this act which expressly or impliedly gives the employer any right to reimbursement under any other circumstances.

If Congress had intended to permit the employer to have a lien for compensation paid, it could have provided for this specifically without any difficulty. Certainly if Congress permitted such reimbursement it would have to consider whether or not some deduction should be made from the reimbursement for the fees and expenses involved in obtaining the recovery. An example of the many factors which a legislative body can and does consider in allowing reimbursement appears in the New Jersey Compensation Act, NJSA 34:15-40, which allows expenses of suit and attorney's fees to be deducted from the reimbursed compensation. See *Travelers Ins. Co.* v. *Lumber Mutual Ins. Co.* 20 N.J. Super. 265, 89 A2nd 717 (Chanc. Div. 1952). See also the discussion in *Conrad* v. *Aero-Mayflower* 152 Pa. Super. 477, 33 A2nd 91 (Super. Ct., 1943); *Klotz* v. *Pfister & Vogel Leather Co.* 220 Wisc. 57, 264 N.W. 495 (1936). May we assume that Congress intended to ignore these factors? Congress is liberal in providing for attorney's fees and costs where the employer assumes the expenses and risk third-party litigation and is successful in obtaining a recovery. 33 USCA 933 (e), *supra.* In view of the liberal intent of the LHWCA, would Congress, had it given a right to reimbursement to the employer where

the employer did not obtain the third-party recovery, have failed to permit the employee to recover at least some of the attorney's fees and cost involved in obtaining the third-party recovery?

Congress, in short, has not expressed its intent on these points. It has legislated where an employer pays pursuant to an award under LHWCA. He is given control of the employee's cause of action. He instigates, pays for, conducts, and takes the risks and expends the effort involved in third-party litigation. He then has a right to reimbursement. He has no such right where this sequence of events does not exist. Cf. *Maryland Casualty Co.* v. *Stephens* 76 Ga. App. 733, 47 S. E. 2nd 108 (1948).

(b) *Only the legislature has the power to add substantial new provisions to the LHWCA.*

It is for Congress and not the courts to rewrite the Longshoremen's and Harbor Workers' Compensation Act. In *Pillsbury* v. *United Engineering Co.* 342 US 197, 72 S.Ct. 223 (1952), the construction and application of the statute of limitations provision in the LHWCA was involved. In refusing to construe the act so as to extend the limitation period where the disability occurred after the injury, but within one year, Mr. Justice Minton speaking for the court stated at page 200:

> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be

one of extension rather than limitation. *While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us.*" [Italics ours]

Nowhere in the LHWCA is the employer given a lien to recover payments made under the LHWCA where it is the employee who assumes the risks and costs of third-party litigation and is successful. The right to reimbursement under a compensation act is purely statutory. See *New York S & W. R. Co.* v. *Huebschmann* 111 N.J. Eq. 547, 162 A 767 (1932); *Dugan Bros.* v. *Robinson* 139 N.J. Eq. 318, 51 A2nd. 218 (Chanc. 1947). Since the LHWCA itself is in derogation of the common law, rights claimed under the act must be created specifically by the terms of the act.

Where the words of an act are ambiguous or vague, or where the omissions involved are minor, a court may be justified in employing statutory construction, like surgery, to give grace and style to the terms of the act. However major grafting operations are properly within the domain of the legislative branch of the government where the many economic, social and political aspects of a particular problem can be weighed, compromised, and resolved by the duly elected representatives of the people.

Under the construction of the court below, not only may the employer refuse to assist or contribute in any way to the prosecution of the third-party litigation, but by refusing to approve any compromise or settlement he will be absolved from any further liability under the LHWCA should it develop that the injured workman would be entitled to treatment and compensation in excess of the settlement amount. *Marlin* v. *Cardillo* 95 F2nd 112 (CA, DC, 1938).

The question presented on this appeal is not simple or trivial. The equitable aspects of the question involve not only the question of whether an employee may retain compensation or the value of services rendered under the LHWCA and the amount of a third-party recovery, but it also involves the issue of who is to assume the work and risk of third-party litigation, and who is to pay for the costs and attorney's fees involved in third-party litigation.

There is nothing in the LHWCA which indicates how Congress intended to settle these issues where the employee rather than the employer obtained the third-party recovery. The problem therefore must remain with Congress. Until Congress amends the LHWCA to express its will, the employer remains without a right to reimbursement where it is the employee who conducts and is successful in the third-party litigation.

(c) *There is no principal of common law which would entitle the employer to be reimbursed for payments made pursuant to the LHWCA without an award.*

The court below in following the ruling in *The Etna, supra,* stated that it rejected the reasoning of *Crab Orchard Imp. Co.* v. *Chesapeake and Ohio Ry. Co.* 115 F2nd 277 (4th Cir., 1940) cert. den. 312 U.S. 702, 61 S.Ct. 807, (1941), in so far as that case conflicted with *The Etna* (Folio 61).

In the *Crab Orchard* case the Workmen's Compensation Act of West Virginia was involved. Judge Dobie wrote an opinion which discussed at length the effect of the failure to provide for subrogation or assignment in a compensation act. The observations which he made are pertinent here.

At page 279 the court stated:

> "* * * The express inclusion of the subrogation provision in Workmen's Compensation Acts prevents

the employee from acquiring for a single injury two separate remedies—the one, in tort, against the third party tort-feasor, the other, in contract, under the Workmen's Compensation Act; for it is quite generally held that, *in the absence of such an express statutory grant to the employer, the employee retains the right to collect full damages from the third party tort-feasor, in addition to his right to collect compensation under the Act.* * * *"*

* * * * *

"The doctrine of subrogation and, as we shall try to show hereinafter, the doctrine of indemnity are both based upon the principle that a benefit has been conferred upon the defendant at the expense of the plaintiff. Then, since the plaintiff has discharged an obligation owed by the defendant, it seems proper for the plaintiff to be subrogated to the rights that the principal creditor had against the defendant to the extent of such discharge. Compare Restatement of Restitution § 162 with § 76 (see parallel notes). But an employer making payment under the West Virginia Act fulfills only his own contractual obligation; he does not in any way satisfy the third party tort-feasor's liability to the employee. Merrill v. Marietta Torpedo Co., supra. The liability of the third-party tort-feasor to the employee still exists, as it does in the instant case, notwithstanding the fact that the employee has made a recovery from the Fund. No basis, therefore, remains (under the principle set out above) for applying the doctrine of subrogation. * * *" (page 280)

* * * * *

"The analogy of payment under Workmen's Compensation Acts to accident or life insurance contract is

compelling. * * *. Both are subject to the same difficulties in the valuation of human life and human suffering. In fact, compensation from a Fund is not measured by the extent of the employee's injury; rather is it measured by the size of his weekly wage. Thus, instead of being an indemnity, workmen's compensation is more in the guise of a pension or an investment, and, like life and accident insurance, is not subject (in the absence of a statute or specific contractual provision) to the principle of subrogation. * * *"

(Citations omitted. Page 281)

* * * * *

"We next consider that phase of appellant's theory which deals with the principle of indemnity. This principle is closely interrelated with the principle of subrogation, and, oftentimes, the possessor of the one right is also the possessor of the other. Cf. Restatement of Restitution § 76g. In any event, much of what has been said in reference to the doctrine of subrogation, as here considered, will apply with equal force to the doctrine of indemnity. A broad definition of indemnity is offered in section 76 of the Restatement of Restitution: 'A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.' A scanning of this definition reveals that the indemnity principle is more limited in application than that of subrogation. Not only must a benefit be conferred upon the defendant by a discharge of his duty or obligation, but the discharge must have occurred under circumstances in which the

plaintiff was, at the same time, discharging a personal obligation coextensive with that of the defendant.

"We think that there is no factual basis here which justifies indemnification. As has been pointed out above, the third party tort-feasor receives no benefit by the employer's payment under the Act. *Furthermore, as the duty and obligation of the employer are different and distinct from the duty and obligation of the third party tort-feasor,* the requisites for the application of the indemnity principles are not met. * * *" (page 282, italics ours).

In *The Etna supra,* the court in declaring that a principle of subrogation applies referred to the Restatement, Restitution, Sec. 162 (1937) at page 39 of its opinion. Judge Dobie in his opinion at page 280 quoted *supra* explains clearly why this principle does not apply.

Restatment, Restitution, Sec. 162 (1937) involves a situation "where the property of one person is used in discharging an obligation owed by another." However, payments by an employer pursuant to the LHWCA discharge no one's obligation but his own.

The underlying theory of compensation is entirely different from the theory of common law negligence. The duties created under a compensation statute and those existing at common law are independent of each other, except as they may be affected by legislation. In *Baltimore & Philadelphia Steamboat Co.* v. *Norton* 284 U.S. 408, 52 S. Ct. 187 (1932) Mr. Justice Butler speaking of the LHWCA and other compensation acts stated at page 414:

"* * * Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. * * *"

Negligence law, by contrast, is based on the principle that one who is negligent should pay for the mischief he causes. When an employer pays for medical expenses and pays the small weekly rates required by the LHWCA following an industrial accident he is merely giving to the employee that which the law insists he provide as part of the employer-employee relationship. He is not discharging any third-party obligation arising out of negligence. Cf. *Newark Paving Co.* v. *Klotz* 85 N.J.L. 432, 91 A 91 (Supr. Ct., 1914).

In *Trumbull Cliffs Furnace Co.* v. *Schachovsky* 111 Ohio 791, 146 N.E. 306 (1924) a double recovery was allowed. A judgment against the third-party tortfeasor was affirmed. At page 308 of the Northeastern Reporter the court stated:

> "Inasmuch as the subcontractor had complied with the compensation statute, the owner was not the employer of Schachovsky at the time of the accident; it had no contractual relation with Schachovsky; it was for the purpose of this suit nothing more than a third person. This fact is a complete answer to the proposition of plaintiff in error that it is inequitable to allow the workman to have two recoveries, one under the Compensation Act and one under this suit. As such third person the owner of the premises could be sued for the negligence of his own employees, which caused the accident, *since the compensation provided by the Workmen's Compensation Law is in the nature of an occupational insurance, and, like general insurance, cannot be deducted and treated as an offset for claims for damages for wrongful injury or death.* * * *" [Italics ours]

Following this decision, the employer attempted in a court action to assert a lien against the third-party tort-feasor for the compensation it had paid to the employee. A demurrer was sustained. *Truscon Steel Co.* v. *Trumbull Cliffs Furnace Co.* 120 Ohio St. 394, 166 N.E. 368 (1929).

POINT II

Where a third person claims part of a fund wholly procured by the efforts of another the part of the fund so claimed is subject to the reasonable expenses incurred in procuring this fund.

(a) *Admiralty courts apply the principles of equitable jurisprudence.*

A federal court, sitting in admiralty exercises some equitable powers and applies the liberal principles of equity jurisprudence to the extent of its powers as a court of admiralty. In *United Fruit Co.* v. *United States* 186 F2nd 890 (1 Cir. 1951) Judge Magruder stated at page 896:

> "• • • A court of admiralty, in cases within its jurisdiction, proceeds upon equitable principles; and if a release is pleaded in defense against a libel in admiralty on a maritime contract, the admiralty court has power to disallow such a defense where under the circumstances the libelant would be entitled to relief by way of rescission or reformation of the release under accepted equitable principles. • • •"

In *Moran Transportation Corp.* v. *Mellina* 185 F2nd. 386 (2 Cir. 1950) Judge Frank in a footnote on page 389 stated:

> "6. That the federal court sitting in admiralty exercises some equitable powers, see W.E. Hedger Com-

pany Transportation Corp. v. Galotta, 2 Cir. 145 F. 2nd 870, Morrison, The Remedial Powers of The Admiralty, 43 Yale L. J. 1 (1933); Cf. Hume v. Moore-McCormack Lines, 2 Cir. 121 F 2nd 336, 344."

The matter is also discussed in 1 Benedict On Admiralty, Sixth Edition, Sec. 71, page 148 and the Supplement (1952) thereto at page 31. See also *American Foreign Steamship Corp.* v. *9000 Tons Ore* [U.S. Dist. Ct., NJ] 1952 AMC 1818, 1929 (1952).

The case of *The Etna* 138 F2nd 37 (3 Cir. 1943), which the court below cites in support, based its position on equitable principles. Judge Jones in answering the contention that 33 USCA 933 (b) provided the only measure for the employer's reimbursement stated at page 39:

> "* * *, we think that the appellant misconceives both the purpose and the scope of that provision and entirely ignores the right to subrogation which, under equitable principles, attaches where one, not acting officiously, pays money on account of a legal obligation resting upon him for the imposition whereof another is held pecuniarily responsible. See Restatement, Restitution, § 162, p. 653, and comment thereon. * * *"

Under Point I we have developed the reasons why this principle of equity is inapplicable in the present case. However if this court feels bound by some equitable principle to permit the employer to assert a lien against a fund before this court, then it should likewise apply the equitable principle that one who has by his services, created, protected or maintained a fund from which others benefit should be paid for his services out of that fund.

Rule 42 of the Supreme Court Rules of Practice In Admiralty and Maritime Cases also justifies the application of equitable principles where one seeks to intervene to assert a lien against a fund in court. It provides:

> "Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene pro interesse suo for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein *according to law and justice.* And if such petition or claim shall be deserted, or on a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party." [Italics ours]

The Rule employs the phrase "according to law and justice." This phrase, unless the word "justice" is meaningless, implies the application of the principles of equitable jurisprudence. Let him who seeks equity be willing to do equity. Let the employer who wishes to benefit from the creation of a fund pay for the services of those whose efforts and at whose risk the fund was created.

(b) *Equitable principles provide for a reasonable attorney's fee out of a fund in court which is created or protected by the efforts of one party to the benefit of others.*

It is a fundamental principle of equity that an attorney who creates, protects, or preserves a fund in court is entitled to reasonable remuneration for his services. In *Harrison* v. *Perea* 168 U.S. 311, 18 S.Ct. 129, 42 L. Ed. 478 (1897) Mr. Justice Peckham stated at page 134 of the Supreme Court Reporter:

"The defendant also objects to the allowance of the solicitor's fee which is charged against the fund. We think no error arises from this action of the court below. By the exertions of the solicitor, the fund was recovered, and it was properly made to bear some portion of the expense of its administration. • • • "

In *O'Hara* v. *Oakland County* 136 F2nd. 152 (6 Cir. 1943) Judge Hicks stated at page 155:

"We are concerned with a principle of equity jurisprudence. Appellant was largely instrumental in protecting and preserving a fund, of which in the end, Oakland County became the owner. The County concedes that it was the beneficiary of his labor and services not only in making the fund available to it, but in the cancellation of future assessments on properties in the drainage districts. It makes no objection to a reasonable allowance to petitioner. The equitable rule is stated in Buell v. Kanawha Lbr. Corp'n., D.C., 201 F. 762, 769, as follows: 'In America no distinction as between solicitors and barristers existing, the doctrine has been extended so as to include all the fees and expenses reasonably due by the successful litigant to his counsel, *and the rule is established that where one goes into a court of equity, and takes the risk of litigation on himself, and successfully creates or preserves or protects a fund to a share in which others are entitled, those others will not be allowed to lie back and share the results of these successful labors without contributing their due share,* and a court of equity by an equitable extension of the English principle has required the payment out of the fund (before distribution) of the reasonable costs and expenses, in-

cluding the reasonable counsel fees of the complainant whose diligence created or preserved the fund for distribution. * * *'" [Italics ours]

In the Restatement, Restitution (1937) Sec 105 it is stated in part:

"(2) A person who through legal proceedings procures or preserves property in which he and another have an interest may be entitled to reasonable compensation for his services and restitution of his expenses in obtaining or preserving the property."

In the comment on this section at page 444, the Reporters state:

"(g) The typical situation calling for the application of the rule stated in this Subsection is that where a stockholder brings suit against the directors or management of a corporation for the purpose of protecting the interests of himself and other stockholders and succeeds in obtaining, for the benefit of all, property which otherwise would not have been obtained. Under these circumstances the court of equity to which the application has been made for relief has discretion in awarding the successful claimant compensation for his own services and reimbursement of attorney fees and other expenses. Similar situations are those where a mortgage bondholder sues for the preservation of the mortgaged property or where a creditor or other person interested in the administration of the estate of a deceased person brings proceedings in a probate or equity court, thereby obtaining administration of the estate which inures to the benefit of himself and other creditors or beneficiaries.

> In all of these cases compensation is allowed only if the claimant was successful in procuring or preserving the property and only if it was property in which the claimant had an interest, although as indicated by the illustrative situations above, it is not essential that he should have a direct property interest."

Assuming, but not conceding, that the intervenor has an interest to the extent of its alleged lien in the amount recovered from the third party tort-feasor then the principle announced in this section applies. The employee here procured a fund in which the employer claims an interest. The employer should in fairness be required to pay part of the expense involved in procuring the fund.

Mr. Justice Frankfurter in *Sprague* v. *Ticonic National Bank* 307 US 161, 59 S.Ct. 777 (1939) stated at page 166:

> "* * * Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power

will alone retain equity as a living system and save it from sterility. * * * "

That the fund in the present case was created solely at the risk of and by the efforts of the employee cannot be denied. The employer escapes entirely from his own obligations as a result and he wishes to obtain the benefits of the employee's efforts as well. The inequity of the situation can be best illustrated by an examination of the arithmetic of the situation.

In the present case the settlement was in the amount of $4000.00. The claimed lien is in the amount of $1,732.54. This leaves a balance of $2,267.46.

The attorney who produced the $4000.00 is entitled to have his contingent fee based on this recovery. However if he does take his share on the basis of this recovery and the expenses are deducted as well, what is left of the $2,267.46? Does the employee have an incentive to settle his case? Could a client ever understand settling a case for $4000.00 and winding up with a few hundred dollars? Suppose the proportional difference between the top settlement figure and the asserted lien were even narrower, e.g. $12,000 and $8,000. The client surely would have no incentive to settle his case. This certainly runs against the policy of the law which encourages settlements.

The case of *Ocean SS Co.* v. *Lumbermens Mut. Cas. Co.* 125 F2d 925 (2 Cir. 1942) cited by the court below is not applicable here. The New York statute involved specifically provided for reimbursement where the employee obtained the recovery and the court was interpreting that provision. That is not the case here.

Since there is no provision in the LHWCA which provides what an employer may receive from a third-party recovery obtained by the employee, the employer, if he is

allowed reimbursement, should in fairness and equity contribute to the cost of creating the fund from which he benefits.

CONCLUSION

No reading of the terms of the LHWCA, no matter how tortured, gives to the employer the right to claim reimbursement for payments made under the LHWCA where the employee did not receive compensation "under an award". Congress' desire on this point, is and remains unexpressed and until Congress acts the employer has no right to any part of the hard-won third-party recovery obtained by the efforts of the employee. The many conflicting political, social, and economic factors which must be considered before the problem is resolved are properly left for Congress to determine.

Likewise there is no principle of equity which gives the employer any rights to make a claim against the amount of the third party recovery.

Congress likewise, has not dealt with the issue of the expense of litigation, including attorney's fees where the employee recovers from a third-party. If it is held that the employer may benefit from a third-party recovery obtained at the expense, risk, and effort of others, the employer should under equitable principles be required to share in the expense involved in producing the benefit he claims.

The issues presented have never before been decided by this court. They are fundamental, of wide application, and deserve the careful consideration and authoritative determination which this court will give. The reasoning of the court below is at variance with the reasoning of the Court of Appeals in the Fourth Circuit involving the construction

of a similar statute. The decision below is probably at variance with other decisions of this court as has been developed in the course of this brief. The LHWCA has not been construed liberally in accord with usual principles.

WHEREFORE, it is respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing the decree of the court below.

Respectfully submitted,

NATHAN BAKER
Proctor for Petitioner
401 Broadway
New York City, New York

BERNARD CHAZEN
On the Brief